HON'BLE SHRI G.S. SINGHVI, THE CHIEF JUSTICE
AND
HON'BLE SHRI JUSTICE G.V. SEETHAPATHY

WRIT APPEAL NO.885 OF 2006

BETWEEN

Sathi Harinarayana Reddy

.....

Appellant

And

The Executive Engineer,
R&B, Amalapuram, East Godavari District & others

.....Respondents

:: JUDGMENT ::

Counsel for the Appellant : Shri Ajay Kumar

Counsel for the Respondents for : Government Pleader

R & B

Dated: 25.08.2006

Per G.S. SINGHVI, CJ

Having failed twice to convince the learned Single Judge to adjudicate his claim emanating from the alleged breach of contract entered into between the parties, the appellant has preferred this appeal under Clause 15 of the Letters Patent with the prayer that order dated 27-7-2006 passed by the learned Single Jude in Writ Petition No.15497 of 2006 may be set aside.

The appellant is a Class-I contractor. In pursuance of CR Agreement No.140/2003-04 dated 01.03.2004, he was awarded contract for execution of work of improvements of Palivela-Pallipalem road from K.M. 0.000 to 6.995 in East Godavari District. After sometime, the appellant filed Writ Petition No.24474 of 2005 for issue of a direction to the respondents to finalise the accounts by closing the contract. During the pendency of that petition, the learned Single Judge directed the respondents not to forfeit the earnest money deposit, but gave them liberty to get the work completed through some other agency. Subsequently, the writ petition was dismissed vide order dated 13.03.2006 with liberty to the appellant to question the termination of contract brought about vide letter dated 27-1-2006. By taking cue from the observations of the Court, the appellant made representations dated 21.04.2006 and 27.05.2006 to Executive Engineer, R&B, Amalapuram, East Godavari District (respondent No.1) to settle the accounts. Respondent No.1 vide his letter dated 06.06.2006 informed the appellant that as a sequel to termination of contract, the earnest money deposit made by him has been forfeited. This action of respondent No.1 prompted the appellant to file Writ Petition No.15497 of 2006 for quashing the termination of contract and forfeiture of earnest money deposit and also for issue of a direction to the respondents to finalize the accounts in lieu of the work done by him.

The learned Single Judge noted that the contract had been terminated pursuant to Clause 60(a) of PS to Andhra Pradesh Standard Specifications and held that in exercise of power under Article 226 of the Constitution of India, the High Court will not enforce the terms and conditions of a contract.

We have heard Shri S. Gopala Rao, learned advocate for the appellant, who made strenuous efforts to persuade us to nullify the termination of contract and forfeiture of earnest money deposit by arguing that, even in a contractual matter, the public authorities cannot take advantage of their dominating position and put the appellant to grave financial injury without complying with the basics of natural justice. Learned counsel referred to the correspondence between appellant and respondent No.1 to show that the breach of contract is entirely attributable to the respondents who arbitrarily revised the drawing and specifications. He then submitted that the learned Single Judge committed a serious error by refusing to entertain the writ petition only on the ground that the terms and conditions of contract cannot be enforced under Article 226 of the Constitution of India and argued that his client cannot be penalized without any fault on his part. In support of his submissions, learned counsel relied on the judgment of the Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.**[1]

In the context of the submissions/arguments made by learned counsel for the appellant, we repeatedly asked him to show whether the contract awarded to his client for undertaking work relating to improvement of Palivela-Pallipalem Road has a statutory sanction or the same was awarded to him in furtherance of public law obligations of the respondents, but the learned counsel could not draw our attention to any statutory provision

pursuant to which the contract was awarded to the appellant or that the same has anything to do with their public law obligation. It is, therefore, reasonable to take the view that contract entered into between the parties does not have any statutory flavour.

The question whether breach of contract simplicitor can be enforced by issue of a writ under Article 226 of the Constitution of India has been considered and answered in negative in large number of cases. In **State of U.P. v. Bridge & Roof Co.(India) Ltd.**[2], the Supreme Court was called upon to consider whether the rates quoted by the contractor were inclusive of the sales tax, if any, on the constructional plants, materials and supplies required for the purpose of execution of the contract. The respondent, who was awarded contract for rehabilitation and improvement of certain stretch of road in Uttar Pradesh applied to the Commissioner of Sales Tax, Uttar Pradesh for composition of tax liability. The Deputy Commissioner, Sales Tax, in exercise of the power delegated to him by the Commissioner, passed order dated 27-5-1992 that sales tax should be deducted at the rate of 1% at the time of payment of balance amount. After three years, the respondent filed writ petition in Allahabad High Court questioning the deduction of sales tax. The High Court did not go into the issue of maintainability of the writ petition, but disposed of the same by observing that the Government shall deduct only 1% of the bill in question up to 31-3-1995. While setting aside the High Court's order on merits, the Supreme Court held:

> "15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e., in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely

reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioner's bill(s) was not a prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

17. Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of sub-clause (4) of clause 70 of the contract is again not a matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator or the civil court, as the case may be. If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the civil court, as the case may be, according to law. Similarly if the Government says that any overpayment has been made to the respondent, its remedy also is the same.

18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of mandamus restraining the Government from deducting

or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. (See the decision of this Court in **Asstt. Excise Commr. v. Issac Peter**[3] where the law on the subject has been discussed fully.) The writ petition ought to have been dismissed on this ground alone.

21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract). The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy — in this case, provided in the contract itself — is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplement them in certain well-recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 — whether for issuance of mandamus or any other writ, order or direction — was misconceived for the reasons mentioned supra."

In **Kerala State Electricity Board v. Kurien E.Kalathil**[4], the Supreme Court considered the issue relating to maintainability of the writ petition in a contractual matter. The facts of that case were that the appellant, State Electricity Board executed an agreement dated 16-9-1981 with the respondent contractor for

construction of a dam. After the commencement of the work, the State Government revised, by notification dated 30-3-1983, the minimum wages payable to employees employed in the works mentioned in the notification, w.e.f 1-4-1983. The respondent contractor claimed that he began making the revised payments to his workers as required for the period 1-4-1983. Till December 1984, the Board reimbursed the respondent contractor. However, from January 1985 the Board stopped making the payments for labour escalation, contending that construction of a dam was not covered by the notification dated
30-3-1983. This disagreement was settled when the Industrial Tribunal made an award on 14-10-1993, holding that the notification was applicable to dam construction (in case of workers employed for construction or maintenance of roads, or building operations and for stone-breaking or stone-crushing). The award became final. On 23-12-1994 the Board wrote the respondent demanding recovery with interest of Rs.3.65 crores, which had been paid in the form of advances for various heads of work. The respondent filed a writ petition seeking to have the letter of demand quashed and also praying for payment of the amounts paid in revised wages. While the petition was pending, the Board, by an order dated 26-2-1997 terminated the contract, which the contractor challenged by filing another petition. The High Court disposed of both petitions holding that the termination of the contract was arbitrary, unjust and not in public interest and directed the Board to pay the amounts claimed by the respondent along with interest at 18%. The Supreme Court partly allowed the appeal of the Board and held:

> "The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition.

> Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily the remedy is not a writ petition under Article 226. A contract would not become statutory simply because it is for construction of a public utility and it has been awarded by a statutory body. .....A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have relegated to other remedies."

In **State of Jammu & Kashmir v. Ghulam Mohd. Dar**[5], the Supreme Court reiterated the settled rule that a writ of mandamus should not ordinarily be issued for enforcing the terms and conditions of a contract.

In view of the law laid down in the aforementioned judgments, it must be held that the learned Single Judge did not

commit any error by refusing to entertain the writ petition filed by the appellant.

We may now advert to the judgment of the Supreme Court in **ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.** (supra) on which reliance has been placed by the learned counsel for the appellant. The facts of that case were that Rassik Woodworth Limited entered into a contract with M/s.RVO Kazpishepromysyrio, a State owned Corporation of Kazakhstan for supply of 3000 MT. of tea. The payment for such tea was to be made by the Kazak Corporation by barter of goods mentioned in the schedule to the agreement dated 26.08.1993. The Kazak Corporation assigned a part of the contract to ABL International Limited. On a direction issued by Reserve Bank of India to cover the risk arising out of the export of tea made by ABL International as per the contract, the latter approached Export Credit Guarantee Corporation of India Limited to ensure the risk of payment of consideration in the contract. On 30.09.1993, the respondent issued a comprehensive risk policy. On account of failure of Kazak Government to fulfill the guarantee given by it, ABL International lodged claim before the Export Credit Guarantee Corporation of India Limited. The latter contested the claim by saying that the ABL Corporation had changed the terms of contract without consulting it. After some correspondence, ABL International Limited filed writ petition in Calcutta High Court. The same was allowed by the learned Single Judge. On appeal, a Division Bench of that High Court reversed the order of the Single Bench and held that disputed questions of fact cannot be adjudicated by the High Court under Article 226. On further appeal, the Supreme Court referred to the earlier judgments in

K.N. Guruswamy v. State of Mysore[6], **D.F.O. v. Ram Sanehi Singh**[7], **Ramana Dayaram Shetty v. International Airport Authority of India**[8], **Gujarat State Financial Corpn. v. Lotus Hotels (P) Ltd.**[9], **LIC of India v. Escorts Ltd.**[10], **State of U.P. v. Bridge & Roof Co. (India) Ltd.** (supra) and **State of Bihar v. Jain Plastics and Chemicals Ltd.**[11], followed some of them, distinguished the other judgments and laid down the following propositions:

1) While entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case has a discretion to entertain or not to entertain a writ petition. The High Courts have however imposed upon themselves certain restrictions in the exercise of this power. This plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless the impugned action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the High Court thinks it necessary to exercise the said jurisdiction.
2) Unless the action challenged in the writ petition pertains to the discharge of a public function or public duty by an authority, the courts will not entertain a writ petition which does not involve the performance of the said public function or public duty.

On merits, the Supreme Court held that Export Credit Guarantee Corporation of India Limited is an instrumentality of the State, inasmuch as, it discharges the functions of the government

and acts as an agent of the government and its action do have a touch of public function or discharge of a public duty and, therefore, it could not act arbitrarily in the matter of repudiation of contract.

In our considered view, the aforementioned judgment is clearly distinguishable. The Supreme Court granted relief to the appellant of that case because, on facts, it was found that an instrumentality of the government, in discharge of its public law obligation, had acted arbitrarily. In the case before us, the contract entered into between the parties does not have anything to do with the public law obligation of the State or governmental function. It is a matter of plain and simple contract between the parties. The contract relating to improvements of Palivela-Pallipalem road from K.M. 0.000 to 6.995 to the appellant and subsequent termination by the respondents has nothing to do with the sovereign functions of the State.

For the reasons mentioned above, the writ appeal is dismissed.

G.S. SINGHVI, CJ

G.V. SEETHAPATHY, J

25.08.2006
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[1] (2004) 3 SCC 553
[2] (1996) 6 SCC 22
[3] (1994) 4 SCC 104
[4] (2000) 6 SCC 293
[5] (2004) 12 SCC 327

[6] AIR 1954 SC 592

[7] (1973) 3 SCC 864

[8] (1979) 3 SCC 489

[9] (1983) 3 SCC 379

[10] (1986) 1 SCC 264

[11] (2002) 1 SCC 216